IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 430 OF 2005.

Shri Menino Fernandes,
son of Caetano Luis Fernandes,
residing at House No.13-A,
Biptimola, Quepem, Goa. .... Petitioner.

Versus

1. Shri Gabriel Fernandes,
and his wife.
2. Smt. Clementina Gabriel Fernandes,
both residing at House No. 750,
Bepquigal, Curchorem, Goa. .... Respondents.

Shri A. F. Diniz, Advocate for the Petitioner.

Shri M.S. Usgaonkar, Senior Advocate with Shri I. Aga, Advocate for the Respondents.

CORAM: R.M.S. KHANDEPARKAR, J.

DATE: 2nd FEBRUARY, 2006.

ORAL JUDGMENT:

Heard the Advocates for the parties. Rule. By consent Rule is made returnable forthwith.

2. The petitioner challenges the Order dated 27th September, 2005 passed by the trial Court, Quepem rejecting the application filed by the petitioner for amendment of his plaint. The trial Court has rejected

the application solely on the ground that the proposed amendment would result in allowing a plea to be introduced in the pleadings which is inconsistent with and disruptive of the original plea.

3. A plain reading of the application for amendment discloses that the petitioner has sought to amend the plaint on the ground of certain plea raised by the respondents in the written statement denying the title of the petitioner. Undisputedly, the original suit is for injunction simpliciter against the respondents whereby the respondents were sought to be restrained from interfering in the property of the petitioner including the part of the house situated in the property, while claiming that only two rooms were let out to the respondents. While contesting the said case, the respondents came out with the defence whereby they denied the claim of the petitioner that they are the lessees in relation to the two rooms of the house, and at the same time claimed to be in lawful possession of the entire house. Having denied the title of the petitioner to the house property, the petitioner sought to amend the plaint by introducing the pleadings regarding such denial of title and consequential relief on that count. The same was rejected by the trial Court. Hence the petition.

4. Considering the pleadings of the parties, it was absolutely inappropriate for the trial Court to hold that the plea which is sought to be introduced

by the petitioner was inconsistent with or disruptive of the original plea. The law on the point that the parties are not forbidden from converting a suit for injunction simpliciter into a suit for restoration of possession of the property is well settled. The latest decision on this aspect is in the casee of ***Sampath Kumar v. Ayyakannu and another*** reported in A.I.R. 2002 S.C. 3369. A plea justifying the claim for restoration of possession which may be sought to be introduced by way of amendment in a suit filed by the plaintiff for injunction simpliciter cannot be construed as inconsistent with or disruptive of the original plea.

5. The plea sought to be introduced by way of amendment can be said to be either inconsistent with or disruptive of the original plea, when both the pleas happen to be mutually exclusive. For example, in case where the plaintiff had filed the suit on the basis of his right accrued from a contract between the parties, cannot be allowed by virtue of amendment to claim right of preemption on the basis of being a tenant or cultivator of an adjoining holding (Vide ***Sri Santosh Kumar Hui v. Sri Prakash Kumar Palit and others*** reported in A.I.R. 1995 Calcutta 381).

6. The learned Senior Counsel for the respondents however submitted that the pleadings which are sought to be introduced do not satisfy the requirements of law under Order 7 C.P.C. and therefore even

though the impugned order on the ground on which the application for amendment was moved by the petitioner may not be sustainable, at the same time there is no justification for allowing the petitioner to amend the plaint in the manner it is sought to be amended. It is too premature for this Court to go into the said issue, considering the fact that the rejection of the application for amendment on which it has been passed is not sustainable, suffice to set aside the order and remand the matter to the Trial Court to re-consider the application filed by the petitioner for amendment of the plaint in accordance with the provisions of law after hearing the parties.

7. In the result, therefore, the petition succeeds. The impugned order is set aside and the matter is remanded to the Trial Court to decide the application filed by the petitioner after hearing the parties and in accordance with the provisions of law. Rule is made absolute in above terms with no order as to costs.

R.M.S. KHANDEPARKAR, J.

sl.